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No. 02-99

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALBERTO VALDEZ,

Petitioner,

v.

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. The State Habeas Court's Failure to Provide a Full and Fair Hearing Is Evident from the Record, Was Found by the District Court, and Was Never Questioned by the Court Below.

The Brief in Opposition begins by attempting to convince the Court that the procedures employed by the state habeas court were not all that bad – that the Petition for Writ of Certiorari has somehow distorted the record and misled the Court. This assertion flies in the face of the federal district court's express finding that Valdez did not receive a "full and fair" evidentiary hearing in state court (App. 82), a finding the Fifth Circuit never questioned (App. 9-10).

The principal supposed "distortion" is Valdez's claim that the state habeas court "admittedly and unapologetically" refused to consider the evidence most material to Valdez's ineffective assistance claim – the transcript of the sentencing phase of the capital murder trial. (Br. at 3, n.2) The record of what occurred, however, could not be clearer. The state habeas judge admitted, without apology, that he simply would not take the time to review the sentencing phase transcript from Valdez's capital murder trial, even though he had not presided at that trial, even though the character of what occurred during the sentencing phase was sharply disputed by the parties, and even though what occurred (and did not occur) was central to Valdez's ineffective assistance claim. In the state judge's own words:

> I have never read the record of the trial and I don't intend to. I don't have the time.

(App. 81; 2/28/97 SF 144-145) Based on this clear admission by the state habeas judge, the federal district court found that the state habeas court had "effectively excluded from evidence some of the most critical evidence of ineffective assistance of counsel" (App. 84; 3 R 23; 2 R 471), and that the excluded evidence demonstrated "the stark lack of preparation of defense counsel for the sentencing phase as well as the prejudice resulting from the lack of preparation" (App. 84, n.19). The Fifth Circuit never questioned these findings.

Nonetheless, as evidence of this supposed distortion, the Brief in Opposition quotes a statement by the state habeas judge that he indeed intended to look at a transcript. (Br. at 3, n.2) But the transcript he intended to examine was not of the sentencing phase of Valdez's capital murder trial (over which he did not preside). Instead, the state habeas judge said he would examine the transcript *of the state habeas hearing* (over which he did preside nearly seven years before).[1] Whether the state habeas judge made good on even this minimal commitment to look at *some* of the evidence is doubtful, however, given that the judge made a similar commitment at the same time to also look at the exhibits introduced during the state habeas hearing – a commitment he demonstrably ignored.

The state habeas judge admitted that he could not find the exhibits that were introduced during the evidentiary hearing nearly seven years earlier, that he needed to review the exhibits themselves and not simply read competing descriptions of their contents, and that if he could not find the exhibits he would need to request copies from counsel. (2/28/97 SF 148-149)[2] Nonetheless, without

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[1] The focus of the state habeas hearing was on presenting the case in mitigation that should have been presented at Valdez's capital murder trial. To determine Valdez's ineffective assistance claim, the state habeas judge would need to compare the evidence that was available, as revealed during the state habeas hearing, with that actually presented during the capital murder trial by reviewing the transcript of the sentencing phase of that trial. Simply reviewing the transcript of *the habeas hearing* would not have revealed what had occurred during the *sentencing phase of the trial*, and thus the state habeas judge was in no position to make the necessary comparison.

[2] The record reveals the following colloquy:

> The Court: Okay. I have gone through the four files and I did not find the exhibits. If I can't find them, you have copies.
>
> Mr. Levinger [Counsel for Valdez]: We can resubmit.
>
> . . .

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ever locating the exhibits or requesting replacements, the state habeas court proceeded to deny Valdez's petition, making findings of fact and conclusions of law that, as the district court found, "essentially repeated verbatim the State's proposed findings and conclusions." (App. 81)[3] Indeed, the court reporter acknowledged two weeks after the state habeas court's ruling that the court's staff had been unable to locate any of the exhibits. (2 R 534-535)

The missing exhibits included evidence central to Valdez's claim of ineffective assistance. Had the state habeas court examined these exhibits, it would have seen that Valdez had been diagnosed as mentally retarded by the Corpus Christi schools when he was 13 – a diagnosis based on tests revealing an IQ of 63 and leading to a conclusion that Valdez was "educable mentally retarded." (App. 71-72) The missing exhibits also included tests administered to Valdez when he was 18, once again revealing an IQ of 63.

> Ms. Smith [Counsel for the State]: I've got an exhibit list somewhere, Your Honor.
>
> The Court: Well, *I need to see the exhibits themselves*. I'll have somebody find them and you can expect an answer within maybe a couple of weeks.

(2/28/97 SF 148-149) (emphasis added)

[3] Although the Brief in Opposition also accuses Valdez of "misrepresenting" the record by characterizing the state habeas court's findings as a rubberstamp of the State's proposed findings, the federal district court, after examining the record, expressly found that the state habeas court's findings were taken essentially verbatim from the State's proposed findings. (App. 81) This finding was clearly supported by the record, which showed that the changes made by the state habeas judge were entirely either matters of form (breaking single paragraphs into separate paragraphs, thereby creating the impression of having added paragraphs), or the addition of a handful of immaterial or conclusory observations. In any event, whether the state habeas judge adopted the State's proposed findings and conclusions was not the basis for the district court's conclusion that Valdez had not received a full and fair hearing. That conclusion was based instead on the state habeas court's actions that effectively excluded from consideration much of the evidence most material to Valdez's ineffective assistance claim.

(App. 72) Finally, the state habeas court would have learned from time records contained in the missing exhibits that Valdez's trial counsel spent a grand total of 59 hours preparing to defend his life and that, as the district court found, "none of this preparation time was spent searching for mitigating evidence in connection with the sentencing phase." (App. 76)

Based on this evidence, the federal district court found that "the judge denied Valdez' petition without seeing evidence which might have been favorable to Valdez, which the judge did not rule must be excluded, and which the judge even indicated had to be reviewed." (2 R 470) The district court further concluded that:

> the state habeas court did not adequately develop the factual record during the habeas proceedings. Further, it appears that this failure prevented Valdez from being able to make material evidence part of the record with respect to his claim for ineffective assistance of counsel.

(2 R 473) Once again, the Fifth Circuit did not (and could not) question these findings and conclusions. (App. 9-10) The deficient state habeas record in this case is thus precisely as Valdez described it in his Petition for Writ of Certiorari.

II. The Fifth Circuit's Interpretation of the AEDPA Effectively Requires Federal Courts to Ignore the Evidence Presented During Mandatory Federal Evidentiary Hearings.

In an effort to justify the Fifth Circuit's erroneous interpretation of the AEDPA, the Brief in Opposition attempts to create the impression that (1) the evidentiary hearing conducted by the district court was discretionary rather than mandatory (Br. at 4), and (2) the purpose for this supposedly "discretionary" hearing was simply to assist the district court as a so-called "procedural safeguard" in evaluating the decision of the state habeas court (Br. at 13-16). Neither of these impressions is correct.

The federal evidentiary hearing in this case was not a discretionary hearing held at the option of the district

court. Because the state habeas court had failed to provide Valdez with a full and fair hearing by refusing to review the sentencing phase transcript and then by losing the exhibits from the state habeas hearing before they could be reviewed, the federal court was *required* to conduct an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 316 (1963) (if the procedure employed by the state "appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's *duty* to disregard the state findings and take evidence anew."). Thus, the district court expressly concluded "that Valdez is *entitled* to an evidentiary hearing on his claim for ineffective assistance of counsel" because he had not received a full and fair state court hearing. (2 R 473-474) (emphasis added) (*see also* App. 82) Indeed, the Fifth Circuit acknowledged that "the district court concluded that, under *Townsend v. Sain*, an evidentiary hearing was mandatory." (App. 5) (citation omitted)

Moreover, the purpose for this mandatory evidentiary hearing was not, as the Brief in Opposition suggests, simply to "facilitate federal review" of the findings of the state habeas court. (Br. at 8, 16) The review provisions of the AEDPA anticipate that state courts will provide appropriate hearings on material questions of fact and will make determinations on those questions. When state courts have provided full and fair hearings, the AEDPA relegates federal courts to performing a review function, much like an appellate court. There is a standard of review, and the review is restricted to the record created in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2). The AEDPA does not, however, address what happens when the state habeas court has failed or refused to provide a full and fair hearing. For example, the AEDPA does not specify when a federal court is required to conduct its own evidentiary hearing, or what is the necessary consequence of a mandatory federal evidentiary hearing on the otherwise applicable standard of review. Those questions continue to be answered by pre-AEDPA precedents, such as this Court's decision in *Townsend v. Sain*. Under *Townsend*, if the federal court is required to conduct its own evidentiary hearing, it is no longer merely

performing a review function. It is now acting as a fact finder and the standards of review are inapplicable.

Indeed, if the review provisions of the AEDPA applied here, as the Fifth Circuit erroneously concluded, the mandatory federal evidentiary hearing would "facilitate" nothing, because in cases in which section 2254(d)(2) applies, a federal habeas court is expressly limited by the AEDPA to examining the record of proceedings before the state habeas court. *See* 28 U.S.C. § 2254(d)(2) (limiting review to whether the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*.") (emphasis added). If section 2254(d)(2) applied in every instance, regardless of whether the state habeas court ever considered the evidence presented to it, federal evidentiary hearings would serve no function at all because the evidence presented at a federal hearing could not considered by the federal court in reviewing the state court judgment. Only by recognizing that the AEDPA simply does not address when federal evidentiary hearings are required, or the necessary consequences of conducting such a hearing, can the Court reconcile section 2254(d)(2) with *Townsend*'s mandate that federal courts have a "duty to disregard the state findings and take evidence anew" when state courts have refused to provide full and fair hearings.[4]

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[4] The Fifth Circuit's confusion regarding how the AEDPA operates is perhaps best illustrated by its direction that on remand the district court must consider evidence that the State attempted to offer for the first time in the federal evidentiary hearing bearing on the issue of whether Valdez was mentally retarded. (App. 33-37) Under the AEDPA, this new evidence could be considered only if the deference provisions in section 2254(d) do not apply. If they do apply, section 2254(d)(2) expressly limits federal review to "the evidence presented in the State court proceeding." Thus, the Fifth Circuit's decision gives the State the benefits of the deference provisions found in the AEDPA with respect to Valdez's previously unconsidered evidence, but then relieves the State

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This correct interpretation of the AEDPA would not, as the Brief in Opposition urges, "wipe the slate clean" and permit the district court to ignore the state habeas court's findings. (Br. at 8) Quite to the contrary, in this case the district court properly determined to defer to those findings that were not tainted by the state habeas court's refusal to consider material evidence. (App. 84 & n.20) Indeed, it is the Fifth Circuit's interpretation of the AEDPA that would render meaningless the federal court's two-day evidentiary hearing – a hearing mandated only because the state habeas court refused to consider the evidence.

III. The Conflict Between the Tenth and Fifth Circuits Is Real, Is Properly Before this Court, and Is in Need of Immediate Resolution.

Remarkably, the Brief in Opposition urges this Court to adopt a rule that review by writ of certiorari is not appropriate whenever the court below has remanded a case rather than rendered judgment. (Br. at 7-8) That is simply not the law. The Court has refused to review interlocutory orders when proceedings on remand might well eliminate any need for review and no good reason exists for immediate review of the order in question. But when, as here, the issue involved is "fundamental to the further conduct of the case," this Court has frequently reviewed interlocutory orders of remand. *See, e.g., Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Mazurek v. Armstrong*, 520 U.S. 968, 975-976 (1997). As explained by the late Justice White:

> where there is an important and clear-cut issue of law that is fundamental to the further conduct

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of the burdens found in those very same provisions with respect to the State's new evidence.

> of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review.

Randolph Central School District v. Aldrich, 506 U.S. 965, 966-67 (1992) (White, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and O'Connor, J.).

One can hardly imagine a circumstance where this standard would more clearly be satisfied and where immediate review would more clearly be justified than here. Whether the AEDPA requires deference to state determinations, even when a federal evidentiary hearing is mandated because the state court refused to consider the evidence, is both an important and clear-cut question of law. The answer to this question is obviously fundamental to the further conduct of the case, because it tells the district judge whether she is free to independently evaluate the evidence presented at the mandatory evidentiary hearing, or whether she must ignore the evidence she sees and hears at that hearing and instead decide the issues presented based entirely on the state court record, giving deference to the state court's findings.

Moreover, the answer to the question presented is fundamental not just in this case, but in cases throughout the Fifth Circuit, and indeed, the United States. The course of habeas cases presently pending throughout the country depends on the answer to this question, as the Brief of Amicus Curiae Paul Richard Colella vividly illustrates. At present, the answer to this important question varies, depending on where the petitioner is located. Although the Brief in Opposition makes the bold assertion that "none of the Tenth Circuit decisions offer a statutory construction contrary to that of the Fifth Circuit" (Br. at 12), the Fifth Circuit itself acknowledged that its decision is in direct conflict with that of the Tenth Circuit in *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998). (App. 24-25) As a result of this conflict, whether a person sentenced to death receives independent review of his or her federal constitutional claims by a court actually willing to examine the record presently depends on whether that person is sentenced to death in Oklahoma (the Tenth

Circuit) or acr ss the state line in Texas (the Fifth Circuit).[5] Because the quality of the American system of criminal justice is grossly denigrated if a person can be put to death based on the findings of a state court that refused to consider the evidence before it, the conflict between the Fifth and Tenth Circuits cannot await another day to be resolved.

IV. Whether the Fifth Circuit's Decision Renders the AEDPA Unconstitutional Is an Important Question of Federal Law that Has Never Been Addressed by this Court and that Valdez Presented to the Court Below.

Although the Brief in Opposition asserts that Valdez never raised in the court below the constitutional problems created by that court's interpretation of the AEDPA (Br. at 18), that is simply not true. In his principal brief filed in the Fifth Circuit, Valdez pointed out that any departure from Fifth Circuit precedent requiring independent federal review of federal constitutional claims when a state habeas court had failed to conduct a full and fair hearing would render the AEDPA unconstitutional. (Appellee's Br. at 58) Thus, when the court below unexpectedly departed from its existing precedents to hold that the AEDPA requires deference even when the state habeas court has refused to consider the evidence, the dissent pointed out that the majority's interpretation of the statute raised serious constitutional questions. (App. 60-61) Once

[5] The Brief in Opposition further asserts that this conflict does not warrant the Court's attention because "[n]othing in *Miller* engages, much less refutes, the statutory-construction analysis conducted by the Fifth Circuit." (Br. at 11) This assertion ignores the fact that *Miller* was decided over two years before the Fifth Circuit decision in this case. Because the reasoning of the Fifth Circuit was not anticipated – not even by prior panels of the Fifth Circuit that had reached the same sensible conclusion as the Tenth Circuit in *Miller* – it is difficult to see how the Tenth Circuit could have possibly "engaged" or "refuted" the unanticipated and later adopted approach of the Fifth Circuit.

the court below decided to depart from its own prior precedents, Valdez then pointed out in his Petition for Rehearing En Banc precisely the same constitutional problems with the court's interpretation of the AEDPA that he has now raised in his Petition for Writ of Certiorari. (Pet. for Rehearing at 13-15) And the dissent from denial of rehearing en banc acknowledged "the serious constitutional questions raised by the panel majority's interpretation of the AEDPA." (App. 117-118)

Moreover, contrary to the view expressed in the Brief in Opposition (Br. at 19), the Fifth Circuit's interpretation of the AEDPA would violate the Sixth Amendment, as applied to this case, by forcing Valdez to show more than what *Strickland* requires to establish an ineffective assistance of counsel claim – and to make this additional showing in his first full and fair opportunity to present that claim (Pet. at 27-29). The Brief in Opposition urges that this issue has already been decided in *Bell v. Cone*, 122 S.Ct. 1843, 1852 (2002). But that is not the case. The petitioner in *Bell* never demonstrated that the state habeas court failed to provide a full and fair hearing, and thus the issue raised here was not even present (much less decided) in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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